

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

LINDA C. TSEU, Executive
Director, on behalf of
the complaint filed by
HAWAIILOA KALIMA AHO;

v.

DEPARTMENT OF PARKS AND
RECREATION, CITY AND COUNTY
OF HONOLULU.

Respondent.

) Docket No. 94-002-E-D

) HEARINGS EXAMINER'S

) FINDINGS OF FACT,

) CONCLUSIONS OF LAW

) AND RECOMMENDED ORDER;

) APPENDIX A; ATTACHMENT 1

HEARINGS EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

1. Chronology of Case

The procedural history of this case is set forth in the
attached Appendix A.

2. Summary of the Parties' Contentions

The Executive Director alleges that Complainant Hawaiiiloa Aho
(hereinafter "Aho") was a contract employee of Respondent City and
County of Honolulu first as a part-time park aide and later as a
full time groundskeeper. The Executive Director asserts that
Complainant was a qualified person with a disability who applied
for a full time civil service groundskeeper position and that
Respondent City and County of Honolulu (hereinafter "City")
violated H.R.S. § 378-2 when it: a) failed to hire Complainant
based on an incorrect determination that Complainant posed a direct
threat to the health and safety of himself; b) used medical

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criteria which were not bona fide occupational qualifications to screen out Complainant; c) retained Complainant as a contract instead of a full time civil service groundskeeper because of his disability; and d) ended its employment of Complainant because of his disability.

Respondent City contends that: 1) Complainant had been hired as a contract employee; 2) Complainant applied for a full time civil service groundskeeper position; 3) Respondent tentatively offered Complainant the position but required him to take a post offer medical examination; 4) Respondent lawfully withdrew its offer of full time civil service employment because the results of the medical examination showed that Complainant posed a direct threat to the health and safety of himself; 5) Respondent lawfully withdrew its offer of full time civil service employment because Complainant could not meet medical criteria which were bona fide occupational qualifications; and 6) Respondent was not required to renew Complainant's contract once it expired.

Having reviewed and considered the evidence and arguments presented at the hearing together with the entire record of these proceedings, the Hearings Examiner hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT¹

1. Complainant Hawaiiloa Aho is a 52 year old man who has lived in Hauula, Hawaii for over 20 years. (Tr. at 14, 18)²

2. Respondent City is a municipal corporation and a political subdivision of the State of Hawaii. Respondent City owns numerous public parks on the island of Oahu. Its Department of Parks and Recreation is responsible for the maintenance of these parks.

3. Respondent City usually hires employees through its civil service process. Persons seeking civil service positions must apply with the Department of Personnel, become certified by that department and be placed on an eligibility list. All persons offered civil servant positions are required to take and pass a medical examination administered by the City's Department of Health. (Tr. at 122-123, 125)

4. The Revised Charter of Honolulu allows Respondent City to also hire employees on a contract basis when there is an immediate need to fill temporary work. Under Charter § 6-303, department divisions are allowed to recruit, interview and select employees without going through the civil service process. Persons offered contract positions involving "heavy physical effort" work are also

¹ To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

² Unless otherwise indicated, "Tr." preceding a page number refers to the transcript of the contested case hearing held on August 29 through September 1, 1994; "Ex." followed by a number refers to the Executive Director's exhibits; "Ex." followed by a letter refers to Respondent City's exhibits.

required to take and pass a medical examination administered by the City's Department of Health. (Tr. at 124-125; Ex. 10 p. 18-20)

5. In 1980, Respondent City contracted with Occu-Med Corporate Health Services to develop comprehensive pre-employment medical standards for all its civil service positions. These medical standards are contained in a manual titled "City and County of Honolulu Health Assessment Program". The medical standards are utilized with position physical effort analyses, which are descriptions of a job's physical work that are developed by the departments. Between 1980-1992, these medical standards were applied to all post offer medical examinations. Since the passage of the Americans With Disabilities Act (ADA) in 1990, Respondent City has been in the process of revising these standards. (Tr. at 314-317, 320; Exs. K, G.)

6. In 1989, the medical standard for asymptomatic coronary artery disease³ stated:

Acceptable if evaluated by a Treadmill Stress Test and is certified by cardiologist as capable of performing the expected work tasks, unless the requirements of the job exceed:

- a. 4 on static strength
- b. 3.5 on explosive strength
- c. 4 on dynamic strength
- d. 4 on trunk strength
- e. 3.5 on stamina

(Ex. G)

³ This standard was rescinded in October 1992.

7. In 1989, the medical standard for hypertension (controlled) stated:

Acceptable, provided the individual is free of limiting end organ damage or complications, and is under knowledgeable medical surveillance and cleared for employment. Severe hypertension with or without evidence of heart disease and cerebral, renal or retinal vessel changes, is not acceptable.

Irreversible cardiac hypertrophy of unexplained etiology is not acceptable.

(Ex. G)

8. In August 1988, Complainant visited some friends who were working at Kualoa Regional Park. One friend, Albert Albeso, asked Complainant if he was interested in working as a park aide for Respondent City. Complainant stated that he was interested. Albeso had Complainant fill out an application for a park aide contract position in the District IV (Waimanalo to Mokuleia) region. Complainant was later interviewed and recommended for hire by a panel of groundskeeper supervisors. (Tr. at 23-24; Ex. 10 p. 15)

9. Park aides are required to perform the following duties: clean restrooms once a day, pick up and bag litter, clean recreation buildings, water and maintain planted areas, request repairs and perform other duties as requested. In July 1990 the position title "park aide" was changed to "groundskeeper" even though the job duties remained the same. Respondent City has separate crews which mow large areas of grass, collect garbage or trim trees. Therefore, park aides/groundskeepers are not required to perform these duties. (Tr. at 34-38, 40-46, 128; Ex. 9 at 40;

Ex. 10 at 23-27; Ex. I)

10. Because the part-time park aide contract position was considered to involve "heavy physical effort" work, Complainant was required to take a medical examination. On September 13, 1988 a doctor under contract with the Department of Health conducted a medical examination on Complainant and found the following conditions:

- a. height - 5'8"
- b. weight - 229 lbs.
- c. blood pressure - 140/98
- d. glucose - 141 mg
- e. cholesterol - 266 mg

(Ex. Q)

11. Complainant's examination results were reviewed by Dr. John Hall, Chief of Health Services for Respondent City. As Chief of Health Services, Dr. Hall reviews medical examination results and determines whether applicants are medically qualified for the positions sought. Dr. Hall determined that Complainant was 42 lbs. overweight, had elevated blood pressure, had abnormal blood lipids and had an abnormal electrocardiogram. Dr. Hall concluded that these conditions created some significant medical risks of harm to Complainant in the performance of the park aide duties. However, Dr. Hall felt that such risks could be reduced if Complainant sought and received treatment for the above conditions. Dr. Hall placed Complainant's application in a "disposition pending" category and instructed Complainant to obtain further medical evaluation and treatment from his private physician. (Tr. at 312-313, 332-335; Ex. 12 at 36, Ex. 13 at 38-40).

12. Complainant's family doctor referred Complainant to Dr. Steven Azuma, a cardiologist, for examination and treatment. Dr. Azuma is the Chief of Cardiology at Kuakini Hospital and the Director of the Critical Care Unit at Castle Medical Center. Dr. Azuma was board certified in internal medicine in 1984 and board certified in cardiology in 1985. (Tr. at 51, 182-183)

13. On September 26, 1988 Dr. Azuma reviewed the City's medical examination results, performed a physical examination on Complainant and obtained Complainant's medical history. Dr. Azuma found that Complainant had no symptoms of heart disease, such as chest pains, shortness of breath or dizziness. Dr. Azuma also conducted a thallium treadmill stress test and an echocardiogram on Complainant. Based on Complainant's medical history, physical exam and tests results, Dr. Azuma concluded that Complainant had hypertension (sustained high blood pressure), hypercholesterolemia (elevated cholesterol), hypertrophy of the left ventricle (thickened left heart chamber) and probably had coronary artery disease (cholesterol build up and blockage in one blood vessel). (Tr. at 53, 186-187, 190, 192-193, 233; Ex. 13 attachment 6)

14. Severe hypertension and hypercholesterolemia may cause organ damage, heart attack, stroke, blindness or kidney damage. Coronary artery disease may cause heart attacks. Treatment of these conditions through medication, refraining from smoking, change in diet and exercise may slow the progress of coronary artery disease and help prevent organ damage. (Tr. at 234-236, 300)

15. Dr. Azuma examined and treated Complainant every other week until December 10, 1988 and periodically through January 1994. Because Complainant couldn't afford to buy medications, Dr. Azuma gave Complainant sample medications to lower Complainant's blood pressure. Dr. Azuma also encouraged Complainant to stop smoking, watch his diet and lose weight. Complainant took the medications and followed Dr. Azuma's advice. He lost weight and was in better control of his blood pressure. (Tr. at 52-54, 193-194, 230-231)

16. Based on Complainant's evaluation and treatment by Dr. Azuma, on November 10, 1988 Dr. Hall found complainant to be medically qualified for the part-time park aide position. (Tr. at 335; Ex. 13 at 46)

17. From November 18, 1988 to June 30, 1989 Complainant worked as a part-time park aide (19 hours per week) in the District IV park region. He cleaned restrooms, mowed small areas of grass, picked up and bagged garbage, raked, trimmed and pulled weeds and checked camping permits at various parks. Complainant's supervisors felt that he was one of their best workers. He never missed a day of work, completed all his tasks and did not appear to have any health problems. (Tr. at 34-38, 40-46, 56-57; Ex. 10 at 21, 29-30, 33-34).

18. In June 1989 Complainant's supervisors encouraged him to apply for a full time civil service groundskeeper position. Complainant submitted an application, was certified for the position, was interviewed and scored highest among the applicants. Complainant was offered the full time civil service groundskeeper

position contingent upon passing the City's medical examination.
(Tr. at 140-141, 145)

19. The duties written in the full time civil service groundskeeper position description are broader in scope than the duties written in the full time contract groundskeeper position description. However, in practice full time civil service groundskeepers perform the same duties as part time contract groundskeepers. Furthermore, supervisors have the discretion to assign groundskeepers to certain parks and/or certain duties. Complainant could have been assigned to the same parks and same duties he held as a contract groundskeeper. (Tr. at 48-49, 390-391; Ex. 10 at 17, 22-23; Ex. J)

20. The physical effort analysis for groundskeeper positions states that the job, inter alia, requires the following functions:

- heavy lifting, 45 pounds and over
- heavy carrying, 45 pounds and over
- pushing (2 hours)
- walking (8 hours)
- repeated bending (4 hours)
- ability for rapid mental and muscular coordination
simultaneously

and is performed, inter alia, in the following environment:

- outside and inside
- excessive heat
- working alone

(Ex. J)

21. Complainant was given a medical examination for the full time civil service groundskeeper position on July 21, 1989. The following conditions were found:

height - 5'8"
weight - 215 lbs.
blood pressure - 138/88
glucose - 122 mg
cholesterol - 214 mg

(Ex. Q)

22. Dr. Hall also reviewed Complainant's July 21, 1989 medical examination results. He determined that Complainant was 24 lbs overweight, had an elevated fasting blood sugar level, had an abnormal lipid profile, had an abnormal treadmill stress test and had an abnormal electrocardiogram. Dr. Hall concluded that Complainant had coronary artery disease, diabetes mellitus, hypertension and was obese. Dr. Hall knew that Complainant could physically perform the essential groundskeeper job duties. However, he determined that Complainant had a very high, immediate risk (95% chance) of suffering a heart attack, stroke or other physical injury even sitting still. Dr. Hall then concluded that Complainant did not meet the City's medical standards for the full time civil service groundskeeper position. This determination was based on: a) the full time civil service groundskeeper position physical effort analysis given to him by the Department of Parks and Recreation; b) the medical standards contained in the City's Health Assessment Program; c) Complainant's medical history and the results of Complainant's physical examination; d) different medical studies on cholesterol, blood pressure and echocardiograms and ejection fractions that Dr. Hall had read; and e) Dr. Hall's view that any risk that can lead to immediate harm medically disqualified an applicant for a civil service job. (Tr. at 339-

340, 345, 362-369, 372-374; Ex. 12 at 49-54; Exs. J, K)

23. Based on Dr. Hall's determination, on July 25, 1989, Respondent City's Department of Personnel wrote to Complainant stating that he did not meet the medical requirements of the groundskeeper position. The letter also stated that Complainant could submit additional information regarding his condition from his private physician. (Ex. L)

24. On August 3, 1989 Dr. Azuma called Dr. Hall to discuss the results of Complainant's July 21, 1989 medical exam and Dr. Hall's assessment that Complainant had an imminent and immediate risk of having a heart attack. Dr. Azuma disagreed with Dr. Hall's assessment. On August 4, 1989 Dr. Azuma wrote to Respondent City stating that Complainant's blood pressure and cholesterol levels were improving and asked the City to defer its medical disqualification of Complainant. (Tr. at 195-196, 369-372; Ex. 13 at 54-56; Ex. L)

25. On August 9, 1989 Dr. Hall notified the Department of Personnel Services and the Department of Parks and Recreation that Complainant was still not medically qualified for the full time civil service groundskeeper position. He also stated that he would reconsider qualifying Complainant if Complainant lost more weight, gained better control of his lipids and lowered his blood pressure and blood sugar levels. By letter dated August 11, 1989 the City's Department of Personnel notified Complainant that he had not met its medical standards and had been removed from the civil service eligibility list. The letter also encouraged Complainant to

reapply for the civil service groundskeeper position after meeting medical standards. (Ex. 13 at 56-58)

26. After being notified that Complainant Aho was not medically qualified for the full time civil service groundskeeper position, Melvin Murakami, the Department of Parks and Recreation personnel officer, spoke to Dr. Hall about retaining Complainant as a contract groundskeeper. This was because Complainant was a very good worker and the Department hoped that Complainant would eventually meet the City's medical standards and be hired as a civil servant. Dr. Hall allowed Complainant to continue employment as a contract worker. (Tr. at 148-151; Ex. 9 at 36-37)

27. Complainant was employed as a part time (19 hours/week) contract park aide from July 1, 1989 to June 30, 1990 (1 year); and as a part time (16 hours/week) contract groundskeeper from July 1, 1990 to December 2, 1990 (5 months) in the same District IV region. In December a civil service groundskeeper at Ahuimanu Playground went out on medical leave and Complainant was hired to replace him as a full time contract groundskeeper until March 2, 1991 (3 months). (Tr. at 130-132; Ex. 9 at 40; Ex. 10 at 35-37)

28. Some time in February 1991 Murakami and District IV superintendent Richard Ushijima decided not to renew Complainant's contract because they felt that Complainant would never pass the City's medical examination for the civil service groundskeeper position. If Complainant had passed the City's medical examination, the Department would have immediately hired him as a civil service groundskeeper. Complainant's supervisor later told

Complainant that because of his medical condition, he would no longer be hired as a groundskeeper. (Tr. at 58-59, 169-170; Ex. 9 at 42)

29. On February 14, 1991, Complainant went to Dr. Azuma for reevaluation. Based on his examination of Complainant, Complainant's description of his job duties, and the fact that Complainant had successfully performed these duties without any symptoms of heart disease, Dr. Azuma wrote to Respondent City on February 21, 1991 stating that Complainant could perform the full time civil service groundskeeper duties without harm to himself. (Tr. at 199-200; Ex. 25)

30. Despite receipt of Dr. Azuma's February 21, 1991 letter, Dr. Tom Taira, chief of Respondent City's Division of Health Services, still found that Complainant did not meet medical standards. By letter dated March 6, 1991 Respondent City's Department of Personnel notified Complainant that it was sustaining its determination that he did not meet medical standards for the groundskeeper position. (Ex. L)

31. Prior to losing his position with Respondent City, Complainant had been a very responsible, hard working and self reliant person. Complainant quit school at age 16 to work on Johnston Island to in order to support his orphaned siblings. He returned to Hawaii, worked at various construction jobs and lived on the beach until he saved up enough money to buy his house in Hauula. He worked and supported his wife and two daughters. Complainant felt very hurt about losing his groundskeeper job with

the City. He is constantly upset and loses sleep about finding another job. Since March 1991, he has lived off his savings, which recently ran out. Presently, his daughters support him and he feels badly about this. He feels stress about paying his mortgage and bills, and worries about losing his house. (Tr. at 14-18, 62-68)

32. It is difficult to predict whether and when a person with Complainant's conditions will have a heart attack. Dr. Azuma estimates that Complainant presently has a 10% chance of having a heart attack within 5 years. (Tr. at 204, 236-237, 239-241, 291)

33. On March 16, 1994, Dr. Hall wrote to Dr. John Cogan and asked Dr. Cogan to perform an independent medical evaluation on Complainant to determine whether Complainant could perform the full time civil service groundskeeper duties without "undue immediate health risks to himself and without undue risk to the safety or health of others". (Ex. R)

34. Dr. Cogan has been a cardiologist with the Queen's Medical Center since 1978. He was board certified in internal medicine in 1976 and board certified in cardiology in 1978. (Ex. S)

35. Dr. Cogan reviewed the materials sent to him by Dr. Hall. On March 18 and 23, 1994 Dr. Cogan had Complainant take an echocardiogram and a thallium treadmill test, respectively. On April 20, 1994 Dr. Cogan conducted a medical examination of Complainant and found that Complainant had no symptoms of heart disease. Based on the materials provided, the results of the

thallium treadmill test, Complainant's medical history and Dr. Cogan's examination of Complainant, Dr. Cogan determined that Complainant has hypertension, hypertrophy of the left ventricle, hypercholesterolemia, coronary artery disease, is obese and possibly has a valve aneurism (expanded heart valve that can rupture). (Tr. 276-277, 280-281, 283-286, 290, 294-295, 301-303; Ex. T)

36. Dr. Cogan estimates, and I find, that in performing the full time civil service groundskeeper duties Complainant has: an approximately 7-1/2% chance of having a heart attack per year; an approximately 3% chance of having a stroke per year; and an approximately 1% - 3% chance of rupturing a heart valve per year. (Tr. at 301-306)

37. A person who does not have Complainant's conditions has a 0% - 1% chance of having a heart attack per year. (Tr. at 239, 300)

38. After March 2, 1991 Complainant sought employment with several construction companies he had previously worked for. However, upon learning that Complainant could not pass the City's medical examination for groundskeepers, these construction companies refused to hire him. Complainant also applied for a park position with the State of Hawaii, but there were no job openings. Since his employment with the City, Complainant has been doing yard work for a neighbor and earns \$50 per month. (Tr. at 60-62, 68-69)

III. CONCLUSIONS OF LAW⁴

A. Jurisdiction

1. The Complaint

At the contested case hearing, Respondent City moved, inter alia, to dismiss the complaint as untimely. Specifically, Respondent argues that the complaint was filed on August 7, 1991, more than 180 days after Complainant was denied the full time civil service groundskeeper position.

H.R.S. § 368-11(c) states that:

No complaint shall be filed after the expiration of one hundred eighty days after the date:

- (1) Upon which the alleged unlawful discriminatory practice occurred; or
- (2) Of the last occurrence in a pattern of ongoing discriminatory practice.

The evidence shows that the complaint was filed within 180 days after the last occurrence in a pattern of ongoing discriminatory practice. Respondent City initially notified Complainant that he was not medically qualified for the full time civil service groundskeeper on August 11, 1989. Yet, Respondent retained Complainant as a contract groundskeeper, hoping that his condition would improve so he could qualify and be hired as a civil service groundskeeper. Respondent City did not finally disqualify Complainant from the civil service and contract groundskeeper positions until it failed to renew his contract after March 2, 1991. Therefore, I conclude that the denial of the civil service

⁴ To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

position was an ongoing discriminatory practice which ceased on March 2, 1991. See, Ross v. Stouffer Hotel Company Ltd., Inc. Supreme Court of Hawaii No. 16486 (August 30, 1994), 1994 WL 465895 (filing date for administrative complaints commences on actual day of discharge, not on day notice of discharge is received). The complaint was filed within 180 days of March 2, 1991. The Commission therefore has jurisdiction over the complaint.

2. Complainant Aho

Respondent City also alleges that H.R.S. Chapter 378 does not apply to Complainant because he was a contract employee. It argues that once Complainant's contract expired, he had no right to renewal of such contract.

The argument mischaracterizes the law and facts of this case. Under H.R.S. § 378-1, "employment" means ". . . any service performed by an individual . . . under any contract of hire . . ." Complainant was a contract employee, not an independent contractor.⁵ He is therefore protected from discriminatory practices under H.R.S. Chapter 378. Respondent City cannot refuse to employ him, even as a contract employee, because of his disability. Furthermore, the evidence shows that the only reason why Complainant was a contract employee was because Respondent City placed him in such position until he could medically qualify for the civil service position. As discussed above, this was an ongoing discriminatory practice.

⁵ In DR-92-007 (March 5, 1993), this Commission held that H.R.S. Chapter 378 does not protect independent contractors from discriminatory practices.

3. Respondent City

H.R.S. § 378-1 defines "employer" to mean

. . . any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States.

Respondent City is a political subdivision of the State having one or more employees. I therefore conclude that Respondent is an employer under H.R.S. § 378-1 and is subject to the provisions of H.R.S. Chapter 378.

B. Disability Discrimination

H.R.S. § 378-2(1)(A) makes it an unlawful discriminatory practice for any employer to refuse to hire, discharge or otherwise unequally treat an individual because of that individual's disability.

This Commission recently adopted administrative rules on disability discrimination, H.A.R. Chapter 12-46, Subchapter 9, §§ 12-46-181 through 12-46-196. Although these rules became effective on August 18, 1994, § 12-46-181 states that Subchapter 9 "reflects the protections which existed under state law protecting persons with handicapped status and is declaratory of existing law". I therefore conclude that such disability rules apply to the present case.

Alternatively, I conclude that such disability rules apply because they codify the safety and BFOQ defenses found in federal

Rehabilitation Act⁶ and Title VII⁷ caselaw. Rehabilitation Act caselaw is instructive because the definition of "disability" as found in H.R.S. § 378-1 mirrors and antedates the definition of "individual with a disability" found in the Rehabilitation Act.⁸ Title VII caselaw is instructive because the BFOQ defense found in H.R.S. § 378-3 and H.A.R. § 12-46-188 is similar to that found in Title VII.⁹

⁶ Rehabilitation Act of 1973, 29 U.S.C. § 701 et. seq. See also footnote 9, infra.

⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e

⁸ 29 U.S.C. § 706B states in relevant part:

. . . the term "individual with a disability" means any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment . . .

H.R.S. § 378-1 (L. 1975) defines "disability" to mean:

. . . the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.

⁹ H.R.S. § 378-3(2) states:

Nothing in this part shall be deemed to:

. . .
(2) Prohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment . . .

42 U.S.C. § 2000e-2(e) states in relevant part:

. . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instance where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

See also, discussion in section III.B.3. below and footnote 13.

Accordingly, in the present case the Executive Director must first establish a prima facie case of discrimination by proving that:

- a) Complainant is a qualified individual with a disability;
- b) Complainant applied for a job with Respondent;
- c) Respondent used medical criteria which screened out or otherwise denied employment to Complainant based on his disability.

H.A.R. §§ 12-46-183, 12-46-188; Prewitt v. United States Postal Service, 662 F.2d 292, 27 EPD 32,251 at 22,822 (5th Cir. 1981); Bey v. Bolger, 540 F.Supp 910, 33 EPD 33,967 at 31,576 (E.D. Pa. 1982).

The burden then shifts to Respondent City to prove that:

- a) Complainant cannot perform essential job duties safely or efficiently with or without reasonable accommodation;
- b) the medical criteria are a bona fide occupational qualification.

H.R.S. § 378-3; H.A.R. § 12-46-188; Prewitt, supra; Bey, supra.

1. Executive Director's Prima Facie Case

The Executive Director met its burden of establishing a prima facie case of disability discrimination.

Complainant Aho was and is a qualified person with a disability. The record shows that Complainant Aho has the impairments of hypertension, hypercholesterolemia, hypertrophy of the left ventricle and coronary artery disease. The Executive Director did not show that such conditions substantially limit any major life activities, or that Complainant had a record of an impairment that substantially limits any major life activities.

However, the Executive Director did show that Respondent City regarded Complainant as having a substantially limiting impairment when it determined that Complainant could not perform any heavy physical effort work without imminently suffering a heart attack, stroke or other injury.

Complainant Aho was clearly qualified for the full time civil service groundskeeper position. He performed the identical contractual groundskeeper duties so competently, his supervisors encouraged him to apply for a full time civil service position. Respondent City argues that the full time civil service groundskeeper position duties can be much broader than the contract groundskeeper duties performed by Complainant. It implies that Complainant cannot perform all the duties listed in the civil service groundskeeper position description. However, regardless of whether Complainant can perform all the duties listed in the position description, the evidence shows that Respondent City could and probably would have accommodated Complainant by assigning him to the same parks and duties he previously held as a contract groundskeeper.

Finally, the record shows that Complainant Aho applied for the full time civil service groundskeeper position and was rejected only because Respondent City determined that Complainant had a substantial risk of suffering a heart attack, stroke or some other injury at any time.

2. Whether Complainant Poses A "Direct Threat"

Respondent has the burden of proving that Complainant poses a direct threat to the health or safety of himself or others that cannot be reduced to a level below a direct threat by a reasonable accommodation. H.A.R. § 12-46-188; Prewitt, supra; Bey, supra.

The determination that a person poses a "direct threat" must be based on an individualized assessment of the person's present ability to safely perform the essential functions of the job, the person's past and current job history and reasonable medical judgment that relies on the current medical knowledge or the best available objective or scientific evidence. Factors to be considered are: a) the harm that may result if the person performed the essential job functions; b) the duration of the risk of harm; c) the nature and severity of the potential harm; d) whether the harm may be significantly greater than if a non-disabled person performed the essential job functions; e) the likelihood that the potential harm will occur; f) the imminence of the potential harm; and g) whether a reasonable accommodation can eliminate or reduce the risk of harm below the level of being a "direct threat". H.A.R. § 12-46-182.¹⁰

¹⁰ In Rehabilitation Act cases, defendants asserting the "direct threat to safety" defense must similarly show that employment of an individual would pose a reasonable probability of substantial harm to that individual's health or safety, and that such harm cannot be eliminated by a reasonable accommodation. Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 30 EPD 33,211 at 27,791-27,792 (9th Cir. 1982); Mantolete v. Bolger, 767 F.2d 1416, 37 EPD 35,455 at 38,909 (9th Cir. 1985); School Board of Nassau County, Florida v. Arline 480 US 273, 94 L.Ed 2d 307, 107 S.Ct 1123, 42 EPD 36, 791 at 45,638 - 45,639 (1987). Factors to be considered are: a) the individual's work history; b) the individual's medical history; c) the nature of the risk; d) the duration of the risk; e) the severity of the risk; f) the probability of the risk occurring and the imminence of the risk. Arline, supra; Mantolete, 37 EPD 35,455 at 38,909-

Respondent City contends that Complainant had a high, immediate risk of having a heart attack, stroke or other injuries.¹¹ The evidence, however, does not support this.

Both Doctors Azuma and Cogan noted that when they examined Complainant, he had no symptoms of hypertension or coronary heart disease. Complainant also did not exhibit any symptoms while working as contract groundskeeper. While Complainant was and is at risk for heart attack, stroke and possible rupture of a heart valve, such harms are not likely or imminent. Both Doctors Azuma and Cogan testified that it is extremely difficult to predict whether or when a person with such conditions will suffer a heart attack. Both doctors estimated that Complainant had an approximately 7-1/2% chance of having a heart attack every year (or a 92-1/2% chance of not having a heart attack every year). Additionally, Dr. Cogan estimated that Complainant had only a 3% chance of having a stroke every year (or a 97% chance of not having a stroke each year) and a 1%-3% chance of rupturing a heart valve each year (or a 99%-97% chance of not rupturing a heart valve each year).¹²

38,910; Bentivegna, 30 EPD 33,211 at 27,292.

¹¹ Respondent City admits that Complainant is able to physically perform the essential groundskeeper job functions. See, Tr. at 373; Ex. K at 3.

¹² In his June 29, 1994 letter to Corporation Counsel, Dr. Cogan opined that because Complainant was at some risk for heart attack, Complainant should only engage in sedentary work (i.e., a desk job). (Ex. T) However in his testimony, Dr. Cogan clarified that he made such recommendation because in his practice, he conducts angiograms on such patients to determine the severity of their coronary artery disease before recommending work or exercise. (Tr. at 292-294)

While Dr. Hall estimates that Complainant had much higher (95%) chance of suffering a heart attack at any time, I find such estimate inaccurate. Dr. Hall's determination was not based on current medical knowledge of hypertension and coronary artery disease. He is not a coronary specialist and his estimate is based on his general knowledge and past reading of medical studies. More importantly, Dr. Hall's estimate diverges greatly from the two cardiologists who examined and tested Complainant.

Respondent City therefore did not meet its burden of showing that Complainant posed a significant risk of substantial harm to his health or safety in performing the full time civil service groundskeeper duties.

3. Whether the Medical Criteria were Bona Fide Occupational Qualifications

Respondent City also contends that the medical criteria used to disqualify Complainant Aho were bona fide occupational qualifications.

H.A.R. § 12-46-182 defines a "bona fide occupational qualification" to mean a standard or criteria which excludes a class of persons on the basis of a specified medical condition in which all or substantially all persons with the condition are either: a) unable to perform the essential job functions with or without reasonable accommodation; or b) pose a direct threat which cannot be eliminated or reduced by reasonable

accommodation.¹³

Respondent City does not meet the above burden. Its 1989 medical standards relating to asymptomatic coronary artery disease and hypertension, together with Dr. Hall's view that "any risk that can lead to immediate harm is too much" did exclude classes of persons who have these conditions. However, Respondent City did not show that Complainant posed a direct threat to the health and safety of himself or others, and did not present any statistics to show that all or substantially all persons with Complainant's impairment would pose a direct threat to themselves or others.¹⁴ (See, discussion in section III.B.2. above; see also, Maine Human Rights Comm. v. Canadian Pacific Ltd., 458 A.2d 1225, 1232-1233, 31 EPD 33,549 (Me. 1983) (employer's BFOQ defense failed when it was unable to produce any statistical evidence to support a finding that substantially all sectionmen with heart murmurs would be unable to safely and efficiently perform their jobs.)

¹³ Title VII cases adopt a similar BFOQ test which requires an employer to show that: 1) the essence of the business operation would be undermined by the hiring of a person from the protected class; and 2) there is a factual basis for believing that all or substantially all persons in the excluded category would be unable to safely or efficiently perform the duties of the job, or that it is impossible or highly impractical to deal with such persons on an individualized basis. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 11 EPD 10,916 at 7856-7857 (5th Cir. 1976); Dothard v. Rawlinson, 433 US 321, 92 S.Ct. 2720, 53 L.Ed.2d 786, 14 EPD 7632 at 5106-5107 (1977); EEOC v. County of Santa Barbara, 666 F.2d 373, 27 EPD 32,396 at 23,703-23,704 (9th Cir. 1982).

¹⁴ Respondent City does not contend that Complainant and all or substantially all persons with his conditions are unable to physically perform the essential groundskeeper job functions. See, Tr. at 373; Ex. K at 3.

C. LIABILITY

Because Respondent City failed to hire Complainant Aho for the full time civil service groundskeeper position solely because of his disability, I conclude that Respondent City is liable for violating H.R.S. § 378-3.

D. REMEDIES

1. Placement of Complainant Aho in a Groundskeeper Position

The Executive Director seeks placement of Complainant Aho into a full time civil service groundskeeper position. Because Complainant Aho is a qualified person with a disability, I determine that Respondent City should be ordered to place Complainant Aho in the next available full time civil service groundskeeper position in the regions he has indicated he is willing to work.

H.A.R. § 12-46-191 and the Rehabilitation Act allow employers to make medical inquiries or to require fitness for duty examinations of an existing employee to determine whether that employee can continue to perform essential job functions or whether that employee poses a direct threat to the health and safety of him/herself or others. Therefore, in the future, if Respondent City has reason to be concerned about Complainant's ability to perform the groundskeeper duties without harm to himself, it may inquire as to the status of his medical conditions and require Complainant to undergo a fitness for duty medical exam.

2. Back Pay

Back pay encompasses the amount Complainant would have earned if he had been hired by Respondent City. Respondent has the burden to prove any offsets to Complainant's expected earnings.

The evidence shows that Complainant would have been hired as a full time civil service groundskeeper by August 1, 1989. I therefore determine that Respondent City should be ordered to pay Complainant Aho back pay in the amount he would have earned as a full time civil service groundskeeper for the period beginning August 1, 1989 and ending on the date he is placed in a full time civil service groundskeeper position. This amount should include any benefits Complainant would have received and should be reduced by the amounts Complainant earned as a contract employee from August 1, 1989 to March 2, 1991 as well as the amounts Complainant earned from yard work during March 1991 to the present.

3. Compensatory Damages

The Executive Director requests that Respondent City be ordered to pay Complainant Aho compensatory damages of \$40,000¹⁵ for the emotional distress he suffered. Pursuant to H.R.S. § 368-17, the Commission has the authority to award compensatory damages for emotional distress Complainant suffered as a result of Respondent City's actions. The Executive Director must demonstrate the extent and nature of the resultant injury and Respondent must

¹⁵ In its Prehearing Conference Statement, the Executive Director sought \$40,000 in compensatory damages for injury to Complainant's feelings, emotions and mental well-being. In its post hearing brief, the Executive Director increased this amount to \$100,000 without any explanation.

demonstrate any bar or mitigation to this remedy.

The evidence shows that Complainant Aho was very hurt, upset and lost sleep after he was terminated from his groundskeeper job. Since March 1991 he has worried constantly about finding new work, paying h's mortgage and losing his house. He feels badly about using up his savings and depending on his daughters to support him. Considering these circumstances, I determine that \$40,000 is appropriate compensation for injury to Complainant Aho's feelings, emotions, mental well-being, personal integrity and dignity.

4. Other Equitable Relief

Finally, the Executive Director asks that the Commission order Respondent City to:

- a) develop a written anti-discrimination policy which shall include procedures for applicants and employees to file discrimination complaints and prompt and thorough investigation of such complaints;
- b) disseminate such policy and procedures to all employees and applicants
- c) formally train all supervisory and management personnel about such policy;
- d) conduct orientations with all employees about such policy;
- e) post notices provided by the Commission setting forth compliance with State civil rights laws in conspicuous places throughout Respondent's departments;
- f) publish the results of this contested case hearing in a press statement provided by the Commission in at least one newspaper published in the State and having general circulation in Honolulu, Hawaii;
- g) provide proof of compliance with the above terms to the Executive Director.

Respondent City has already developed a non-discrimination policy and complaint/investigation procedure. (Exs. E, F, N)

I therefore recommend that the Commission direct the Executive Director to submit its comments on Respondent City's policy within 60 days of the effective date the Commission's final decision in this matter. I also recommend that the Commission direct Respondent City to adopt in substance the Executive Director's comments and accordingly modify its policy and complaint/investigation procedures within 90 days of the receipt of the Executive Director's comments.

I also recommend that the Commission direct Respondent City to conduct formal training for all management and supervisory personnel and orientation for all employees on the revised non-discrimination policy and procedures within 180 days of modifying such policy and procedures.

The Commission should also direct Respondent City to post notices provided by the Executive Director regarding compliance with state employment discrimination laws on employee bulletin boards throughout the City's departments.

I believe that the best way to publicize this decision and Respondent City's non-discrimination policy to the public is to require Respondent City to publish the attached Public Notice (Attachment 1) in a newspaper published in the State of Hawaii having a general circulation in the City and County of Honolulu.

I finally recommend that the Commission direct Respondent City to confirm, in writing, its compliance with the above terms to the

Executive Director within 30 days of completing such terms.

RECOMMENDED ORDER

Based on the matters set forth above, I recommend that the Commission find and conclude the Respondent City violated H.R.S. § 378-3 when it failed to hire Complainant Aho as a full time civil service groundskeeper on the basis of his disability.

For the violation found above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:


1. Respondent City to immediately employ Complainant Aho in the first available full time civil service groundskeeper position in the region in which he has indicated that he is willing to work;
2. Respondent City to pay Complainant Aho back pay in the amount he would have earned as a full time civil service groundskeeper, starting on August 1, 1989 and ending when he is placed in a full time civil service groundskeeper position. This amount should include benefits he would have received and should be offset by any amounts Complainant received as a contract park aide, contract groundskeeper and as a yard worker.
3. Respondent City to pay Complainant Aho \$40,000 as damages in compensation for injury to his feelings, emotions, mental well-being, personal integrity and dignity.
4. The Executive Director to submit its comments on Respondent City's non-discrimination policy and

complaint/investigation procedures within 60 days of the effective date of the Commission's final decision in this matter.

5. Respondent City to modify its non-discrimination policy and complaint/investigation procedure to adopt, in substance the Executive Director's comments within 90 days after receiving such comments.
6. Respondent City to conduct training of all its management and supervisory employees and orientation of all its employees on the modified non-discrimination policy and complaint/investigation procedures within 180 days of modifying these.
7. Respondent City to post notices provided by the Executive Director regarding compliance with state employment discrimination laws on employee bulletin boards throughout the City's departments.
8. Respondent City to publish the attached Public Notice (Attachment 1) in a newspaper published in the state of Hawaii having a general circulation in the City and County of Honolulu within 30 days of the Commission's final decision in this matter.
9. Respondent City to confirm, in writing to the Executive Director, its compliance with the above ordered relief within 30 days of completion.

Dated: Honolulu, Hawaii, OCTOBER 19, 1994.

HAWAII CIVIL RIGHTS COMMISSION



LIVIA WANG
Hearings Examiner

Copies sent to:

Moly K. Hung, Esq. Deputy Corporation Counsel
Karl K. Sakamoto, Esq. HCRC Enforcement Attorney

APPENDIX A

On November 29, 1993 the Executive Director sent Respondent Department of Parks and Recreation, City and County of Honolulu (hereinafter "City"), a final conciliation demand letter pursuant to Hawaii Administrative Rule (H.A.R.) § 12-46-17.

On March 8, 1994 the complaint was docketed for administrative hearing and a Notice Of Docketing Of Complaint was issued.

On March 23, 1994 the Executive Director filed its Scheduling Conference Statement. Respondent City filed its Scheduling Conference Statement on March 29, 1994. A Scheduling Conference was held on April 6, 1994 and the Scheduling Conference Order was issued April 13, 1994.

On July 18, 1994 notices of hearing and prehearing conference were issued. The Executive Director filed its Prehearing Conference Statement on August 15, 1994. Respondent City filed its Prehearing Conference Statement on August 17, 1994 and filed an Amended Prehearing Conference Statement on August 22, 1994. By agreement of the parties, the hearing was rescheduled to August 29, 1994 at 1:30 o'clock p.m. and an Amended Notice of Hearing was issued on August 18, 1994. On August 22, 1994 a prehearing conference was held and the Prehearing Conference Order was issued that day.

On August 22, 1994 Respondent City attempted to file a Motion For Dismissal. However, because August 22, 1994 was the deadline for motions to be heard, the motion was untimely and was rejected

for filing.

The contested case hearing on this matter was held on August 29, 30, 31 and September 1, 1994 at the Hawaii Civil Rights Commission conference room, 888 Mililani Street, 2nd floor, Honolulu, Hawaii pursuant to H.R.S. Chapters 91 and 368. The Executive Director was represented by Enforcement Attorney Karl K. Sakamoto. Complainant Aho was present during portions of the hearing. Respondent City was present through its representative, Melvin Murakami and was represented by Deputy Corporation Counsel Moly K. Hung. After the presentation of the Executive Director's case, Respondent City renewed and filed its Motion For Dismissal pursuant to H.A.R. § 12-46-48. After considering the pleadings and arguments presented, the Hearings Examiner verbally denied Respondent's motion.

The parties were granted leave to file proposed findings of fact and conclusions of law and/or hearing briefs. On September 16, 1994 the Executive Director filed its Post Hearing Memorandum.

ATTACHMENT 1

PUBLIC NOTICE

published by Order of the
HAWAII CIVIL RIGHTS COMMISSION
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
STATE OF HAWAII

After a full hearing, the Hawaii Civil Rights Commission has found that the Department of Parks and Recreation, City and County of Honolulu, violated Hawaii Revised Statutes Chapter 378, Employment Discrimination, when it failed to hire a applicant for a full time civil service groundskeeper position because of his disability.

(Linda C. Tseu on behalf of the Complaint filed by Hawaiiiloa Aho vs. Department of Parks and Recreation, City and County of Honolulu Docket No. 94-002-E-D, [date of final decision] 1994).

The Commission has ordered us to publish this Notice and to:

- 1) Immediately hire that applicant as a full time civil service groundskeeper
- 2) Pay that applicant back pay in the amount he would have earned (including benefits) if he had been hired at the time of his application
- 3) Pay that applicant a monetary award to compensate him for emotional injuries he suffered
- 4) Allow the Executive Director of the Hawaii Civil Rights Commission to comment on the non discrimination policy, and complaint/investigation procedures developed by the City and County of Honolulu
- 5) Require the City and County of Honolulu to modify its non discrimination policy and complaint/investigation procedures pursuant to the Executive Director's comments and to conduct training sessions for its management, supervisors and employees on such policy and procedures
- 6) Require the City and County of Honolulu to confirm, in writing, its compliance with the above terms

DATED: _____

BY: _____
Authorized Agent for the City
and County of Honolulu